1980

Allen-Rowe Specialties Corp. v. U. S. Construction, Inc. et al : Appellant's Petition for Rehearing

Utah Supreme Court

Peter W. Billings; Warren Patten; Charles B. Casper; Fabian & Clendenin; Attorneys for Appellant; Gordon L. Roberts; Daniel M. Allred; Val R. Antczak; Parsons, Behle & Latimer; Attorneys for Respondents;

IN THE SUPREME COURT OF UTAH

ALLEN-HOWE SPECIALTIES CORP., a Utah corporation,	)	
Plaintiff and Appellant,	)	
v.	)	Case No. 16209
U.S. CONSTRUCTION, INC., a corporation, JACOBS ENGINEERING CO., a corporation, and WYOMING MINERAL CORPORATION, a corporation,	)	
Defendants and Respondents.	)	

APPELLANT'S PETITION FOR REHEARING

Appeal from the Summary Judgment of the
Third District Court for Salt Lake County
The Honorable G. Hal Taylor, Judge

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Plaintiff/Appellant petitions for a rehearing to ask this Court to consider two dispositive issues that were apparently overlooked in this Court's opinion. The dispositive issues are whether there are facts in the record that tend to show (1) that U.S. Construction waived a contractual provision requiring plaintiff to submit claims within five days for delay, interference and extra work, or (2) that plaintiff complied with that provision for all work done after August 8, 1977. These issues were raised and briefed, but apparently overlooked as they were not mentioned in this Court's opinion.

FACTS

Plaintiff is a subcontractor on a building project who made claims against U.S. Construction, its contractee, and others because of excess costs incurred as a result of delays, interference and extra work. U.S. Construction and the other

defendants asserted (1) that plaintiff assented to an accord and satisfaction that discharged plaintiff's claims and, (2) that a contractual provision requiring plaintiff to give U.S. Construction notice of any claim for delay, interference or extra work within five days of the occurrence giving rise to the claim barred plaintiff's claims. The trial court entered summary judgment for defendants without specifying the reasons for its action.

This Court, in its opinion dated April 21, 1980, held that no accord and satisfaction was reached, but that plaintiff's failure to comply with the five-day notice provision of the contract barred plaintiff's claims and justified the trial court in granting defendants' motion for summary judgment. This Court thus disposed of plaintiff's claims on the basis of the five-day notice provision.

I.

REHEARING SHOULD BE GRANTED WHEN THIS COURT HAS OVERLOOKED AN IMPORTANT ISSUE

This Court has held that a petition for rehearing may be granted where the Court's opinon overlooks an important issue:

> ...a rehearing should not be applied for, unless we have misconstrued or overlooked some material fact or facts...or have either misapplied or overlooked something which materially affects the result.

Cummings v. Nielson, 42 Utah 157, 129 P. 619, 624 (1912). Accord, Brown v. Pickard, 4 Utah 294, 11 P. 512 (1886); In re MacKnight, 4 Utah 237, 9 P. 299 (1886). Indeed, this Court recently affirmed a summary judgment but later modified its

opinion and remanded the case for trial when a petition for rehearing demonatrated that genuine issues of material facts had been overlooked. Albrecht v. Uranium Services, Inc., 607 P.2d 836 (Utah 1980).

Plaintiff seeks rehearing only so that this Court may consider whether there is some evidence in the Record that U. S. Construction waived plaintiff's strict compliance with the five-day notice provision or whether plaintiff complied with that provision for work done after August 8, 1977. The issue was briefed (Appellant's Reply Brief at 10-13) but apparently overlooked by this Court.[1/]

II.

THERE IS EVIDENCE IN THE RECORD FROM WHICH A TRIER OF FACT COULD FIND THAT DEFENDANTS WAIVED THE FIVE-DAY NOTICE PROVISION OF PLAINTIFF'S SUBCONTRACT.

It is well-established that contractual provisions in construction contracts requiring written notice of claims for additional compensation to be made either before the work is done or within a short time thereafter may be waived. Rivercliff Co. v. Linebarger, 233 Ark. 105, 264 S.W.2d 842, cert. denied, 348 U.S. 834 (1954) (waiver by subsequent conduct in paying claims for which written approval had not been obtained); Vitra-Spray of Florida, Inc. v. Gumenick, 144 So.2d

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1/ Because the trial court's order does not specify the reasons for granting defendants' motion for summary judgment or indicate which issues were argued before it, the Record does not reveal which issues the trial court considered or why it disposed of them as it did.

533 (Fla. App. 1962); (same); Annot., 2 A.L.R.3d 620 §§ 19-27 (1965).

A waiver is the intentional relinquishment of a known right, and may, as Rivercliff and Vitra-Spray illustrate, be implied from conduct:

> A waiver is the intentional reliquishment of a known right. To constitute a waiver, there must be an existing right, benefit, or advantage, a knowledge of its existence, and an intention to relinquish it. It must be distinctly made, although it may be express or implied.

Sandberg v. Klein, 576 P.2d 1291, 1294 (Utah 1978).

There is evidence in the record from which a trier of fact could find that defendants waived plaintiff's compliance with the five-day notice provision. On July 20, 1977, a crane operated by the project's engineering firm, defendant Jacobs Engineering, interfered with plaintiff's crane, causing plaintiff considerable additional labor costs. Plaintiff's first written claim for this interference and delay was on August 25, 1977, more than a month after the occurrence. (R. 237, ex. D-18, D-35, D-36). Despite plaintiff's noncompliance with the five-day notice provision, U.S. Construction paid for the interference and delay. (R. 237, ex. D-27).

On August 17 or 18, 1977, plaintiff's president met with U.S. Construction's president to discuss plaintiff's claims. U.S. Construction did not tell plaintiff's president that his claims were untimely. On the contrary, the two company presidents worked together to prepare a full documentation of plaintiff's claims, some of which dated back to the beginning of the project, for consideration on the

merits at a meeting between plaintiff and all of the defendants scheduled for August 22, 1977. (R. 238 at 71-80; R. 238, ex. P-50). As a result of his meeting with U.S. Construction's president, plaintiff's president prepared a detailed accounting of his claims, which was presented at the August 22 meeting. (R. 237, ex. D-35).

The minutes of the meeting show that no one present mentioned the five-day notice provision. On the contrary, excerpts from the minutes of the meeting show that plaintiff's claims were considered on the merits:

> Herm Smith [Jacobs' Construction manager] requested that Allen-Howe go thru all time sheets and list specifically by day each problem area with a recap to support. Allen-Howe should submit to U.S.C. who would in turn submit to Jacobs.
>
> ...
>
> Pres Jensen [president of U.S. Construction] feels it is important that we satisfy the needs of the owner and also to see that Bill Howe receives some payment.
>
> ...
>
> Herm Smith... Some of the inefficiency manhours should be charged to U.S. Construction.... Present all extras to Pres [Jensen]. Pres will be responsible for "X" number of items and the balance will then be taken to Jacobs by U.S. Construction.

(R. 238, ex. P-46).

Plaintiff forwarded the requested documentation of his claims to U.S. Construction on August 25, 1977, (R. 237, ex. D-18), and continued work on the project. He had been lulled into believing that his claims and accompanying documentation were sufficient. Indeed, plaintiff's claim for the interference and delay caused by the crane on July 20, 1977, was paid as a result of this meeting. (R. 237, ex. D-25, D-26,

D-27.) Had plaintiff been told that its claims were untimely plaintiff could either have ceased work, or have submitted claims on a daily basis after August 22. Plaintiff did not do so because defendants, by their conduct, waived the five-day notice provision.

These facts are some evidence that defendants, by their conduct, waived the five-day notice provision. Whether a party to a contract has, by his conduct, waived a provision intended for his benefit is, of course, a question for the trier of fact. See Mel Hardman Productions, Inc. v. Robinson, 604 P.2d 913 (Utah 1979). The trier of fact should in this case decide whether defendants in fact waived that provision.

III.

THERE IS EVIDENCE IN THE RECORD FROM WHICH A TRIER OF FACT COULD FIND THAT PLAINTIFF COMPLIED WITH THE FIVE-DAY NOTICE PROVISION OF ITS SUBCONTRACT FOR ALL WORK DONE AFTER AUGUST 8, 1977.

On August 8, 1977, plaintiff sent U.S. Construction advance notice that plaintiff was incurring extra costs daily because of delay and interference, and estimated that the extra costs would amount to $35,173.00 by the end of the project. (R. 237, ex. D-12). With resepct to all work done after August 8, 1977, plaintiff complied with the contract by giving advance notice of the nature and amount of its claims.

CONCLUSION

Because this Court apparently overlooked the evidence that U.S. Construction waived the five-day notice provision, and that plaintiff in fact gave advance notice for all claims after August 8, 1977, plaintiff seeks rehearing and

modification of this Court's opinion. Because these issues generate genuine issues of material facts which, in view of this Court's opinion are dispositive, the case should be remanded to the trial court for resolution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of May, 1980, I delivered two true and correct copies of the foregoing Appellant's Petition for Rehearing to Gordon L. Roberts, Daniel M. Allred and Val R. Antczak of Parsons, Behle and Latimer, 79 South State Street, Salt Lake City, Utah 84111, Attorneys for Respondents.